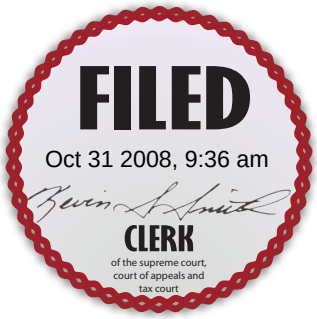

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IN THE
COURT OF APPEALS OF INDIANA

A.WAYNE GIBSON and DON SHEARER,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 02A03-0802-CV-81
	)	
R. BRUCE DYE,	)	
	)	
Appellee.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Daniel G. Heath, Judge
Cause No. 02D01-0301-PL-31

October 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

A. Wayne Gibson and Don Shearer (collectively "the Appellants") appeal the denial of their motions for summary judgment and the trial court's order requiring them, as co-guarantors, to contribute to R. Bruce Dye's payment of certain promissory notes. We affirm.

Issues

The Appellants raise two issues, which we restate as:

I. whether the trial court properly denied their motions for summary judgment; and

II. whether the trial court properly entered judgment in favor of Dye on his third-party complaint.

Facts

The Appellants owned All Sports Manufacturing, LLC, ("All Sports") a company that distributed sports merchandise. In 2000, the Appellants contacted Dye based on his success with his own company, Heritage Food Service Equipment, Inc., ("Heritage Food"), and asked him to become involved in All Sports. In addition to owning 100% of Heritage Food, Dye obtained a controlling interest in All Sports and changed the name to Heritage Sports Marketing, Inc., ("Heritage Sports").

Dye's initial involvement with Heritage Sports was successful; however, in 2002, Heritage Sports experienced financial difficulties. During this time, Dye capitalized on the tax advantages of Heritage Sports' financial hardship by claiming 95% ownership interest in Heritage Sports. When it operated as All Sports, the company accrued debt,

which was refinanced to include Dye and the Appellants as personal guarantors after Dye became involved in the business.

Specifically, in 2001, the Appellants and Dye personally guaranteed a promissory note to Randy Aumsbaugh in the amount of $176,127.05. Some of this note was repaid, but in December 2001, default judgment was entered against Heritage Sports in the amount of $96,395.31 plus interest on the balance of the note. On January 25, 2002, Heritage Food issued a check in the amount of $99,016.24 to pay off the note to Aumsbaugh.

Also in 2001, the Appellants and Dye personally guaranteed a promissory note to Farmers and Merchants Bank in the amount of $218,810.61. In 2002, Heritage Sports defaulted on the note, which then had a balance of $134,918.29 plus interest and attorney fees. In December 2002, the note was sold and assigned to Lakeview Farms, Inc., ("Lakeview") for a total of $141,158.39. Lakeview then sought payment from Heritage Sports, which eventually paid the loan off in the amount of $149,029.70. At the time of the pay-off Heritage Food had deposited $137,109.50 into the Heritage Sports account.

During this time, Dye filed a third-party complaint against the Appellants seeking contribution from them for Dye's payoff of the two notes. Gibson and Shearer each filed motions for summary judgment, which the trial court denied. After a bench trial, the trial court found in favor of Dye and ordered the Appellants to pay a contribution to Dye. The trial court, however, could not determine the appropriate amount of the contribution without an additional evidentiary hearing. Following a second hearing, the trial court determined that the Appellants each owed Dye $50,849.41. The Appellants now appeal.

Analysis

I. Summary Judgment[1]

The Appellants first contend that the trial court improperly denied their individual motions for summary judgment. "On appeal from an order denying summary judgment, we use the same standard of review used by the trial court: summary judgment is appropriate only when the evidence shows no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Hartman v. Keri, 883 N.E.2d 774, 777 (Ind. 2008); see also Ind. Trial Rule 56(C). "All inferences from the designated evidence are drawn in favor of the nonmoving party." Hartman, 883 N.E.2d at 777.

Gibson and Shearer moved for summary judgment on the theory that Heritage Food, not Dye, paid Heritage Sports' debts and, accordingly, Dye is not entitled to contribution as a matter of law. On appeal, the Appellants rely heavily on the notion that to be entitled to contribution, Dye must have "directly ma[d]e the payments personally" to Aumsbaugh and Lakeview. Appellants' Br. p. 9. This argument, however, overstates the law. The cases addressing the equitable doctrine of contribution generally require a party to have paid a debt—they do not specifically require the person seeking contribution to have paid the debt with a personal check.

Based on the designated evidence, whether Dye ultimately paid the debts is a disputed question of fact. Dye established this factual dispute by designating the affidavit

[1] Although the Appellants appeal the denial of summary judgment after a trial, "a party who fails to bring an interlocutory appeal from the denial of a motion for summary judgment may nevertheless pursue appellate review after the entry of final judgment." Keith v. Mendus, 661 N.E.2d 26, 35 (Ind. Ct. App. 1996), trans. denied. "[T]his court has long addressed appeals from denials of motions for summary judgment following entry of a final judgment or order." Id.

of Bruce Gorrell, who is a controller for Heritage Sports and Heritage Food. In his affidavit, Gorrell stated that the entire amount of the checks paid to Aumsbaugh and Lakeview were ultimately charged against the capital account of Dye. Accounting ledgers were attached to support these statements.

Construing this evidence in the light most favorable to Dye, we agree with the trial court that there were genuine issues of material fact as to whether Dye ultimately paid the debts of Heritage Sports, which were jointly guaranteed by Dye, Gibson, and Shearer. Further, the Appellants' argument regarding corporate entities involves legal doctrines and does not resolve the factual dispute related the equitable doctrine of contribution at issue here.[2] See Stevens v. Tucker, 87 Ind. 109, 122 (1882) ("The principle is universal that the right of contribution is founded in doctrines of equity. It does not depend upon contract."). Gibson and Shearer have not established that the trial court improperly denied their motion for summary judgment.

II. Judgment in Favor of Dye

The Appellants also argue that the trial court improperly ordered them to contribute to the payment of the debts. In reviewing claims tried without a jury, the findings and judgment are not to be set aside unless clearly erroneous, and due regard is to be given to the trial court's ability to assess the credibility of the witnesses. Fraley v. Minger, 829 N.E.2d 476, 482 (Ind. 2005) (citing T.R. 52(A)). A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to

[2] Because we do not rely on the alter ego doctrine as a basis for denying summary judgment, we do not address the Appellants' arguments regarding that doctrine.

support the judgment and when the trial court applies the wrong legal standard to properly found facts. Id. Although findings are reviewed under the clearly erroneous standard, we do not defer to conclusions of law, which are reviewed de novo. Id. To determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made. Id.

Regarding Dye's payments to Heritage Food and Heritage Food's payment of Heritage Sports' debts, the trial court found:

> 21. [Heritage Food] transferred funds to [Heritage Sports] and such transfers were made to pay obligations of [Heritage Sports]. Such transfers were accounted for through "inter-company notes[”], which, in substance, are an obligation of the shareholder, Mr. Dye, not [Heritage Food], because there is no apparent subsidiary relationship between those two entities. The only relationship is that of, ah, an individual who has sole ownership of [Heritage Food] and the majority ownership of [Heritage Sports]. . . .
>
> 22. In effect, the profits of [Heritage Food] were used to subsidize the unprofitable performance of [Heritage Sports]. The inter-company notes between the companies made for very accurate accounting, as opposed to Dye writing checks from his personal checking account to the pay the losses suffered by [Heritage Sports]. . . .
>
> * * * * *
>
> 25. Every dollar that Dye put into [Heritage Sports] was one less dollar Dye was able to receive from [Heritage Food]. . . .
>
> * * * * *
>
> 45. There were very "sloppy business practices" used regarding the accounts and books of [Heritage Sports] and [Heritage Food]. There should be a clear distinction of business and personal assets and this is not the case here.

> What you have here is whatever the individual owner wanted to without distinction. . . .
>
> 46. Contributed capital does not belong to the shareholder. It's an additional investment that is "locked inside the company." The purpose of the additional contributed capital is so that a large purchase can be made or so that the company can continue to operate. The funds contributed become the entity funds and not the contributors, once the contribution is made . . . .

App. pp. 21-28.

The trial court specifically concluded:

> 4. . . . . While it is true that Dye did not personally pay the debts at issue from his personal checking account, it is clear that he personally suffered less income because of the debts paid by his Heritage companies. . . .
>
> * * * * *
>
> 6. . . . there is no question of Dye's misuse of the corporate form. The unrebutted testimony of Jay Star showed the Court that Dye was using the corporate accounts of his Heritage companies to pay personal obligations. While this is disconcerting, it is of little moment in the Court's consideration of the equities of the issue of Shearer and Gibson's liability for contribution here.
>
> 7. . . . however, the Court is greatly concerned for the equity of awarding Dye a proportionate contribution from Shearer and Gibson in a case such as this in which Dye received a substantial tax loss claim for the debts his Heritage company paid here. He would receive, in effect, a windfall. This would be inequitable.
>
> * * * * *
>
> 9. Regarding "indemnification claims" by Shearer and Gibson against Heritage Foods and Dye because Dye and Heritage Foods "operated as an alter ego of Heritage Sports," the Court again cannot conclude that such claims were proven

> here. Again, Shearer and Gibson came to Dye and knew that he would require control of [All Sports]. There is no cause and effect between Dye's misuse of the corporate form and any damage to Shearer and Gibson's benefits or obligations. The cause and effect of the demise of the LLC and its successors was that NASCAR licensing was not profitable. This was conceded by all parties in testimony before the Court. Dye may have made some questionable product purchases that ultimately did not turn a profit to pay the debts at issue here; so had Shearer and Gibson. The misuse of the corporate form by Dye had little or no affect on the profitability or marketing.
>
> 10. The Court concludes that Shearer and Gibson are liable to Dye for an equitable contribution for debts paid by Dye's corporation, [Heritage Food].
>
> 11. However, the Court furthermore concludes that in order to serve equity and natural justice, as required by the cases set forth above, that tax benefit to Dye from claiming such debts on his income tax returns, must first be credited before any such contribution by Shearer and Gibson is calculated.

Id. at 29-30.

The Appellants do not challenge the trial court's findings of fact; however, they do argue that the trial court improperly concluded Dye was entitled to contribution after it found he did not personally pay the debts. The Appellants also claim that although Dye made capital contributions to Heritage Sports, the contributions did not constitute payment of the notes. The Appellants urge that when Dye made the capital contributions to Heritage Sports, the payments became property of Heritage Sports. The Appellants claim that they should not have to subsidize Dye's bad investment in Heritage Sports.

Again, the Appellants' legal arguments regarding the corporate entities do not address the equitable nature of the doctrine of contribution, which rests on the principle

that where parties stand in equal right, the equality of burden becomes equity. Cook v. Cook, 92 Ind. 398, 401-02 (1884). "Equity looks through mere forms to find the natural justice of the whole transaction." Norris v. Churchill, 20 Ind. Ct. App. 668, 671, 51 N.E. 104, 105 (1898). "When there is an entire debt owed equally by several, the solvent debtors must share equally in any burden thrown upon them by the insolvency of a part of their number." Id. at 670, 51 N.E. at 104.

It is clear that through Dye's actions Heritage Sports debts were paid. Heritage Food's payment of the debts ultimately resulted in a personal loss to Dye. Because the Appellants were co-guarantors of the notes, equity requires them to contribute to the payment of the debts. To hold otherwise would wrongly permit the Appellants to be unjustly enriched to the extent that they would benefit from issuance of the notes but would not be required to repay them. See Erie Ins. Co. v. George, 681 N.E.2d 183, 186 (Ind. 1997) (comparing the doctrine of subrogation to contribution and describing them as equitable doctrines with the ultimate purpose of preventing unjust enrichment). The Appellants have not established that the trial court's final order was clearly erroneous.

Conclusion

The trial court properly denied Shearer's and Gibson's motions for summary judgment and properly ordered the Appellants to contribute to Dye's payment of Heritage Sports' debts. We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.